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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
Governor

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W. C. TOTTEN

v.

Docket No. 29-88-036-4

MINGO COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, W. C. Totten, is employed by the Mingo County Board of Education as a principal assigned to Tug Valley High School. He filed a Level IV appeal on February 18, 1988 protesting his five day suspension. A Level IV hearing was held on July 27, 1988.<sup>1</sup>

By letter dated February 11, 1988 grievant was informed by Superintendent of Schools, Harry Cline, he would be suspended

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<sup>1</sup>At the time of the appeal grievant's representative indicated the matter might be resolved and requested that a hearing be postponed until such time as negotiations with the Board were completed. Grievant obtained legal counsel in June 1988 and joined counsel for the Board in a request for a continuance of a hearing scheduled on July 6, 1988 and the request was granted.

for five (5) days without pay beginning February 15, 1988 "upon the grounds of cruelty and insubordination" (Joint Exhibit No.2). The letter further noted the action was taken because grievant had administered corporal punishment to a student at Tug Valley High School in violation of guidelines contained in W.Va. Code, 18A-5-1 and Mingo County Policy Governing Disciplinary Procedures. The parties do not substantially disagree on the facts surrounding this incident but offer opposing views as to the applicability of W.Va. Code, 18A-5-1 and county student disciplinary policy. For reasons hereinafter discussed the merits of these arguments need not be addressed.

Grievant's initial contention relates to the procedures followed by the superintendent of schools in effecting his suspension. He asserts the recommendation to suspend was presented to the Board on February 11, 1988 and no official action was taken at that time but Mr. Cline nevertheless initiated the suspension in violation of the provisions of W.Va. Code, 18A-2-8 requiring Board approval in such matters. Mr. Totten further contends that even if the Board did take action on February 11, 1988, it was later voided because he did not receive the written charges within two days of their presentation as also required by W.Va. Code, 18A-2-8. The Board's response to these allegations is somewhat ambiguous but it generally takes the position that its actions were in substantial compliance with grievant's due process rights.

W.Va. Code, 18A-2-8 establishes the procedures to be followed in cases of suspension and dismissal and provides:

Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty, but the charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to provisions of article twenty-nine [§18-29-1, et seq.], chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended.

W.Va. Code, 18A-2-7 also addresses these matters and in pertinent part provides:

The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter.

...

The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board.

It is clear a county board of education, pursuant to these provisions, has the final say in the suspension of school personnel and while a superintendent of schools may take temporary action

in such matters, a vote by the board must ultimately be taken. In the present case the Board was informed of the corporal punishment by the student and her mother during an executive session of a regularly scheduled meeting on February 11, 1988. (T.\_\_\_) The mother, Ms. Hosfelt, testified the Board members present at that time informed her they could not hear her account of the incident unless Mr. Totten was also present. (T.\_\_\_) The minutes of that meeting indicate that, upon return to open session, Mr. Robert Simpkins, President of the Mingo County Board of Education, announced "no action was taken while in executive session" (Joint Exhibit No.3). On February 14, 1988 at approximately 9:00 p.m. grievant was given a letter of suspension dated February 11, 1988 (Joint Exhibit No.2), in which Mr. Cline informed him:

...as Superintendent of Schools for the Board of Education of the County of Mingo, under the provisions of West Virginia Code, 18A-2-7, I do hereby suspend you from employment, without pay...

(Emphasis added)

Mr. Cline was obviously acting within his authority to temporarily suspend the grievant but he had a subsequent duty to bring the matter before the Board as soon as possible. At such time the Board could exercise its alternate authority to affirm or overrule his decision. There was no evidence presented at the Level IV hearing that the matter was ever taken to the Board by the superintendent of schools. Such documentation is an essential element of the burden of proof in dismissal and suspension

cases upon appeal to Level IV. A failure of a superintendent of schools to present charges to a county board of education within a reasonable period of time following an exercise of the temporary authority to suspend as required by W.Va. Code, 18A-2-7 vitiates the action.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

#### FINDINGS OF FACT

1. Grievant, W. C. Totten, is employed by the Mingo County Board of Education as a principal assigned to Tug Valley High School.

2. On or about February 3, 1988 grievant administered corporal punishment to a student at his school.

3. On February 11, 1988 the student and her mother appeared at a regularly scheduled meeting of the Mingo County Board of Education and informed the Board of the incident but no official action was taken to suspend grievant.

4. Grievant subsequently received a letter dated February 11, 1988 from Superintendent of Schools, Harry Cline, informing him of his suspension without pay for a period of five (5) days effective February 15, 1988.

5. The Mingo County Board of Education never gave its approval of grievant's five (5) day suspension.

#### CONCLUSIONS OF LAW

1. Pursuant to the provisions of W.Va. Code, 18A-2-7 a superintendent of schools who suspends a school employee must present the reasons therefor to the county board of education as expeditiously as possible and said board must vote to approve or overrule said suspension.

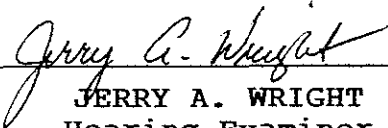
2. A failure of the superintendent of schools to present to the county board of education the reasons for the suspension of a school employee and obtain approval thereof vitiates said suspension.

3. The failure of Mr. Harry Cline, Superintendent of Schools, to gain approval of the five (5) day suspension of the grievant, W. C. Totten, from the Mingo County Board of Education vitiates said suspension.

Accordingly, the grievance is **GRANTED** and the Mingo County Board of Education is hereby **ORDERED** to reimburse the grievant, W. C. Totten, for any loss of wages he may have incurred as a result of his improper suspension and remove from his personnel

file any and all letters, memorandum or other documents relating to said suspension.

Either party may appeal this decision to the Circuit Court of Mingo County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
JERRY A. WRIGHT  
Hearing Examiner

Dated: September 29, 1988